Supreme Court, U.S.
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Docket No. 09-941 NOV 30 2009

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The Supreme Court Of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

David H. Disraeli, Pro Se

vs

The United States Securities and Exchange Commission

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Questions Presented for Review

1. Did the Court of Appeals issue a decision in direct contradiction to its own prior decisions relating to the SEC's decision to use the harshest possible sanction in lieu of any other possible sanction for violations of its statutes
2. Is the Court of Appeals ruling in direct contradiction with this Court with respect to the proper analysis of what is a material fact in securities fraud cases?
3. Did the Court of Appeals allow the SEC to abuse its discretion by failing to consider all mitigating factors before finding fraud and assessing penalties?

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I

PEITITION FOR A WRIT OF CERTIORARI

Petitioner David Disraeli ("Disraeli") respectfully requests that the Court summarily reverse the June 19, 2009 order of the United States Court of Appeals for the D.C. Circuit or grand a writ of certiorari to review that order.

OPINIONS BELOW

The United State's Securities and Exchange Commission's final order is attached to this petition at pages 18 through 92. The court of appeals' June 19, 2009 order is attached to this petition at pages 93 and 94. The appeals court's order denying Disraeli's petition for rehearing en banc is attached to this petition at page 96.

STATEMENT OF JURISDICTION

This Court has jurisdiction because this petition involves a final decision of a United States Court of Appeals. The Appeals Court for the D.C. Circuit issued a final decision in this case on June 19, 2009 and denied rehearing En Banc on August 31, 2009. The underlying case is a final decision by the United States Securities and Exchange Commission entered on December 21, 2007. Jurisdiction is provided by 28 U.S.C §1254(1).

II
STATUTES AND REGULATIONS INVOLVED IN THE CASE

This case involves Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5, Section 206 of the Investment Advisers Act of 1940 and Advisers Act Rule 206(4)-4(a)(1), codified as: 15 U.S.C. § 77q(a), 78j(b), 80b-6; 17 C.F.R. § 240.10b-5, 275.206(4)-4(a)(1).

III
STATEMENT OF THE CASE

This case was a review of a decision by the Court of Appeals for the D.C. Circuit regarding its review of a final decision and order issued by the U.S. Securities and Exchange Commission (hereafter "the SEC"). The Court of first instance is any U.S. Court of Appeals for review of orders relation to violations of 15 USC § 80b-13(a), 15 USC §77i(a), and 15 USC §78y(a) The D.C. Court of Appeals affirmed the decision of the SEC but provided no explanation for their decision. This case centered around securities fraud, misappropriation of funds, and willfully making false statements to the SEC in the filing of form ADV. The Commission found that there was an offering of securities and the use of offering proceeds did not comport with the offering document, and that various other defects in the offering document amount to fraud.

IV
ARGUMENT

This case is extremely important because if left to stand, the Appeals Court for the DC circuit has lowered the bar for what is required to rob one of his livelihood and bar him from the securities industry. The issue of a permanent bar has been addressed by this Court and other Appeals Courts. This case is also important because, if left to stand, allows the DC Circuit to overlook the SEC's decision to rewrite the law regarding the "Reasonable Investor Standard". The Reasonable Investor standard lies at the heart of every securities fraud case and many other types of securities litigation. The SEC also abused its discretion by ordering the securities industry's "Death Penalty". Petitioner filed his appeal to challenge the Commission's finding of fraud which is not supported by the substantial evidence, and the severity of the sanctions imposed, which Petitioner submits are arbitrary and capricious. The Appeals Court ruling does not address the standard test for materiality in securities fraud cases set forth by the U.S. Supreme Court, nor its own and sister circuits precedent requiring the SEC to fully explain its choice of sanction in lieu of other sanctions in its arsenal.

The Appeals Court ruling fails to address how it applied the Steadman dictates (see STEADMAN v.SEC 603 F.2d 1126, 1137 to the instant case. This 5th Circuit opined in Steadman:

> "When the Commission chooses to order the most drastic remedies at its disposal, it has a greater burden to show with particularity the facts and policies that support those

sanctions and why less severe action would not serve to protect investors" (Steadman v. SEC 603 F.2d 1126, 1137)

and went on to say:

"In our view, however, permanent exclusion from the industry is "without justification in fact" unless the Commission specifically articulates compelling reasons for such a sanction. For example, the facts of a case might indicate a reasonable likelihood that a particular violator cannot ever operate in compliance with the law, See SEC v. Blatt, 583 F.2d 1325, 1334 (5th Cir. 1978), or might be so egregious that even if further violations of the law are unlikely, the nature of the conduct mandates permanent debarment as a deterrent to others in the industry, see p. 1142 Infra."

The SEC decision (Appendix "A") fails to articulate any compelling reasons for the issuance of the death penalty, but more specifically why no other sanction would suffice. In his brief before the D.C. Circuit, Petitioner strongly asserted the fact that the SEC decision failed to address why it chose the particular sanction it chose and why no other sanction would suffice (The DC court sent the Paz case back for this very reason). The SEC opted not to counter in their reply briefs. This very Appeals Court opined in Paz Sec. v. SEC as recently as 2007 that:

"We do not suggest the Commission must make an on-the-record finding that a sanction is remedial, but it must explain why

imposing the most severe, and therefore apparently punitive sanction is, in fact, remedial, particularly in light of the mitigating factors brought to its attention." (Paz Sec. v. SEC, 494 F.3d 1059, 1065)"

Although they SEC was formally put on notice that their opinion was void of any discussion of alternative sanctions, they chose not to address them. Petitioner submits that the SEC had no meaningful way to explain their actions because there were arbitrary. Therefore, the DC Circuit ruling conflicts with its opinion in Paz and the 5th Circuits' opinion in Steadman.

IV
Materiality

In order to prevail in an administrative context in a 10b-5 securities fraud case, the SEC must show, based on a preponderance of the evidence that there was a material fact misrepresented or omitted. 15 U.S.C. §77q(a) states:

> (a) Use of interstate commerce for purpose of fraud or deceit
>
> It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) by the use of any means
>
> or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly -

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of

the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The Appeals Courts and the Supreme Court have traveled this road many times, yet the DC Circuit would re-write prevailing law if their decision stands.

SEC v. MacDonald, 699 F.2d 47 (1st Cir. 1983)

"The proper standard for determining whether an omitted fact was material in a Rule 10b-5 case is the same as that formulated by the Supreme Court in TSC Industries, Inc. v. Northway, Inc., 1976, 426 U.S. 438, a proxy-dispute case, namely, whether there is "a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of a reasonable shareholder." Id. at 449; Harkavy v. Apparel Industries, Inc., 2 Cir., 1978, 571 F.2d 737, 741 & n.5; Holmes v. Bateson, 1 Cir., 1978, 583 F.2d 542, 558 & n.20 . . . .the Court in TSC Industries, ante, stressed that

materiality depends upon what a reasonable shareholder would, not might, consider important . . ." (SEC v. MacDonald, 699 F.2d 47, 49) The materiality of information is a mixed question of law and fact. SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1466 (2d Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3799 (U.S. May 23, 1997) (No. 96-1862). "The legal component depends on whether the information is relevant to a given question in light of the controlling substantive law. The factual component requires an inference as to whether the information would likely be given weight by a person considering that question." Id. at 1466-67 (citations omitted). To be material, the information need not be such that a reasonable investor would necessarily change his investment decision based on the information, as long as a reasonable investor would have viewed it as significantly altering the "total mix" of information available. TSC Indus., 426 U.S. at 449; Flynn v. Bass Bros. Enters., 744 F.2d 978, 985 (3d Cir. 1984). Material facts include those "which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (in banc). They include any fact "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities." Id. at 849 (quoting [**18] List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965)). (SEC v. Mayhew, 121 F.3d 44, 51-52)

The Gravamen of Petitioner's position is as follows: He sold $105,000 of stock in his own investment advisor to friends and family, mostly through oral communication but also through a written offering document. The SEC found that $84,500 found its way into Petitioner's personal bank account through a loan. Although Petitioner admits this loan was not disclosed to the investors, but submits that it was immaterial. The SEC refused to analyze its own admitted exhibits to determine where these funds ultimately went. These jointly admitted exhibits show that the vast majority of the funds would up in the business, as as did Petitioner's own funds. Poor bookkeeping is not fraud. The SEC also ignored sworn statements from all but one shareholder stating that the departure, if it occurred was not material to them. The SEC largely ignored these affidavits. The SEC also ignored $70,000 in dividends paid through management fee offsets - $70,000 of cash that the shareholders would have otherwise had to pay for management fees, as well at cash payments Petitioner made against the loan. The most offensive departure from prevailing law was the SEC's failure to consider the "total mix of facts" when determining the materiality of a particular fact. For example in his offering document, Petitioner disclosed a number of highly negative facts that could have resulted in the total failure of the enterprise. In Joint Exhibit JDA 72 Petitioner disclosed:

1. The securities were "high risk" (cover page)

2. This offering involves a high degree of risk, conflicts of interest and the payment of

substantial fees and other compensation to David Disraeli, (page 1)

3. Lifeplan's registration was initially only for 120 days, (page 2)

4. The company was a startup with no history (page 2)

5. It is the opinion of the Company that the State Securities Board of Texas would oppose Lifeplan Associates Inc.'s registration if it chose to register in Texas (page 5)

6. Actual uses of the funds will be different and the difference could be material. (page 7)

7. We believe that Texas Securities Board would oppose, based on their recent action, the registration of Mr. Disraeli. At the time of the Initial Closing we will not yet have obtained a permanent registration with the SEC. There are no assurances we will be able to successfully obtain the required registration. If not, then we will not be able to continue operations and you will lose all of the start-up costs and lose the opportunity to participate in the Company's business plans. Page (12)

8. Mr. Disraeli's past regulatory activity may make any entity in which he is involved subject to higher scrutiny.

The "total mix of facts" certainly should encompass disclosures that included many risks that could have rendered Lifeplan Associates defunct. Again these issues were brought to the attention of both the SEC and the Appeals Court.

At the end of their opinion, the Appeals Court even ruled that Petitioner could offset his disgorgement obligation if he could show that monies were repaid to the operating entity, something the SEC refused to do. Therefore, there are serious questions as to how much, if any ill gotten gains exist left unresolved by the DC Circuit.

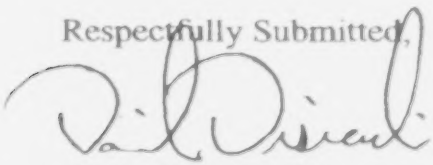
"All the circumstances" (TSC Industries, Inc) also should have included the ten to twenty year relationship that Petitioner had with each of his shareholders and the fact that Petition did after all accomplish the main objectives of the business plan.

V

Prayer

Petitioner prays that this Petition for Certiorari be granted to resolve the conflicts between the DC Circuit and the Supreme Court, The DC Circuit and the 5th Circuit, and the DC Circuit and itself.

Respectfully Submitted,



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Appendix "A"

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933 Rel. No.8880 / December 21, 2007 SECURITIES EXCHANGE ACT OF 1934 Rel. No. 57027 / December 21, 2007 , INVESTMENT ADVISERS ACT OF 1940 Rel. No. 2686 December 21, 2007 Admin. Proc. File No. 3-12288

In the Matter of

DAVID HENRY DISRAELI and LIFEPLAN ASSOCIATES, INC.

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING
INVESTMENT ADVISER PROCEEDING
CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Registration Violations

Books and Records Violations

Investment adviser and corporation incorporated by investment adviser made material misstatements and omissions in offer and sale of securities to clients. Investment adviser registered with the Commission without satisfying the requirements for Commission registration and made material misstatements to the Commission in registration filings. Investment adviser failed to maintain accurate books and records. Held, it is in the public interest to revoke investment adviser's registration, to bar investment adviser from association with a broker, dealer, or investment adviser, to impose a civil money penalty on investment adviser, to order disgorgement from investment adviser, and to impose cease-and-desist orders on investment adviser and corporation.

APPEARANCES:

David Henry Disraeli, pro se and for Lifeplan Associates, Inc.

Marshall Gandy, for the Division of Enforcement.

Appeal Filed March 29, 2007, Final Brief Received July 2, 2007

I.

David Henry Disraeli ("Disraeli") and Lifeplan Associates, Inc. ("Lifeplan") appeal the initial decision of an administrative law judge. The law judge found that Disraeli and Lifeplan willfully violated Section 17(a) of the Securities Act of 1933,

Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5, and that Disraeli violated Section 206 of the Investment Advisers Act of 1940 and Advisers Act Rule 206(4)-4(a)(1), by making material misstatements and omissions in the offer and sale of securities. 1/ The law judge also found that Disraeli willfully violated Advisers Act Sections 203A and 207 by registering with the Commission as an investment adviser when he did not qualify for Commission registration and by making material misstatements and omissions in his registration applications. 2/ The law judge found further that Disraeli violated Advisers Act Section 204 and Advisers Act Rules 2042(a)(1), 204-2(a)(2), and 204-2(a)(6) by failing to maintain accurate books and records. 3/ The law judge revoked Disraeli's investment adviser registration, barred Disraeli from association with a broker, dealer, or investment adviser, imposed a $120,000 civil money penalty on Disraeli, ordered that Disraeli disgorge $84,300 plus prejudgment interest, and imposed cease-and-desist orders on Disraeli and Lifeplan. We base our findings on an independent review of the record except with respect to those findings not challenged on appeal. 4/

1/ 15 U.S.C. §§ 77q(a), 78j(b), 80b-6; 17 C.F.R. §§ 240.10b-5, 275.206(4)-4(a)(1).

2/ 15 U.S.C. §§ 80b-3a, 80b-7.

3/ 15 U.S.C. § 80b-4; 17 C.F.R. § 275.204-2(a)(1), (2), (6). The Order Instituting 2043(c)(1). The law judge found that the Division failed to prove these violations, and Proceedings also charged that Disraeli violated Advisers Act Rules 204-3(a) and the Division did not appeal the law judge's determination.

4/ Disraeli has filed a motion "for Abatement and Settlement Discussions" requesting "that the Commission abate the current appeal pending the outcome of settlement discussions." Disraeli represented, however, that counsel for the Division of Enforcement "would not support any settlement discussions." We deny the motion.

II.
Respondents

David Henry Disraeli is registered with the Commission as an investment adviser under the name "David Henry Disraeli DBA Lifeplan Associates." Disraeli provides discretionary investment advisory services to twenty-five clients, twenty-four of whom reside in Texas, and has received more than $500 in fees more than six months in advance. Pursuant to written advisory agreements with his clients, Disraeli receives a fee equal to 1.5% of the assets under management for advice about his clients' investments.

Disraeli incorporated Lifeplan in Texas around September 30, 2003. He holds eighty percent of Lifeplan's outstanding stock; approximately eleven of his advisory clients hold the remaining

twenty percent. Disraeli is Lifeplan's sole officer, director, and employee. Lifeplan shares Disraeli's home address.

III.

The Lifeplan Offering

From September 2003 to December 2003, and also in December 2004 and March 2005, Disraeli offered and sold shares of Lifeplan common stock. A "Confidential Limited Offering Memorandum," dated October 21, 2003 (the "October Memorandum"), offered 200,000 Lifeplan shares pursuant to Rule 504 of Regulation D of the Securities Act of 1933. 5/ It stated that the shares would "be sold at $.50 each to capitalized [sic] the company with $100,000" and listed a minimum offering amount of $50,000. According to the October Memorandum, Lifeplan planned to "form two limited partnerships, one a market neutral hedge fund and the other a fund to purchase charged off consumer debt." The October Memorandum also stated that Disraeli "will not draw a salary but will distribute all profits annually pro rata based on stock ownership." The October Memorandum represented that the proceeds of the offering would "be used for working capital, legal fees administrative fees and other expenses." 6/

The October Memorandum stated that Lifeplan "was granted registration as an Investment Advisor with the Securities and

Exchange Commission," and represented that Lifeplan was "the successor entity to Disraeli and Associates in all respects." Disraeli & Associates was a sole proprietorship that Disraeli had registered with the Commission as an investment adviser in 1993.

5/ 17 C.F.R. § 230.504. The October Memorandum consisted of two double-sided pages.

6/ Although the October Memorandum is dated October 21, 2003, the record indicates that Disraeli sold Lifeplan shares as early as September 30, 2003. 4

The October Memorandum stated that Lifeplan would "attempt to consummate management agreements with Disraeli and Associates' former clients" and that Lifeplan would "charge 1.5% of assets under management." Disraeli's clients were friends and family with whom Disraeli had had a business relationship of between ten and twenty years' duration. In his investigative testimony, Disraeli testified that these individuals executed new advisory agreements after Disraeli formed Lifeplan. Disraeli stated that his clients "got a new agreement with a new fee schedule." The record indicates that, after Disraeli formed Lifeplan, Disraeli began charging his investment advisory clients fees around November 2003. Disraeli offered and sold the Lifeplan shares to his investment advisory clients. Disraeli testified that he conducted the offering by

calling his clients and sending them the October Memorandum. He stated that the October Memorandum constituted "the nuts and bolts of what [he] was telling people." He added that he told them they would get "20 percent of their original investment in cash per year." According to Disraeli, his clients had the opportunity to ask questions, and he met with at least two clients personally. Disraeli told his clients that he "needed to raise some money." He testified that he did not "remember having any substantive discussion about the specific use of the proceeds" and "thought it was understood that [he] needed the money to operate." Disraeli testified further that, regarding his use of the funds for personal expenses, he "didn't tell [his clients] anything." 7/ The one subscription agreement in the record states that the investor "received no representations or warranties (other than any contained in the Offering Memorandum) from the Company or its employees or agents, or any other person and [sic], in making [his] investment decision." A document entitled "Lifeplan Corporate Books" indicates that, between September 2003 and December 2004, nine clients purchased 200,000 Lifeplan shares for a total of $95,000. 8/

On October 9, 2003, after raising only $30,000 of the $50,000 minimum offering amount, Disraeli transferred $12,000 from Lifeplan's bank account to his personal bank account to cover the purchase of a

$9,300 cashier's check payable to the IRS to release a lien on all property and rights to property belonging to Disraeli for failing to pay personal income taxes. 9

7/	Disraeli provided this testimony in response to a question from his counsel asking him if it was correct that he did not inform his clients that the proceeds would be used for personal expenses. Disraeli's counsel objected that Disraeli's answer was non-responsive and asked the question a second time. Disraeli then stated that he "did have conversations about that" but did not describe the conversations.
8/	According to the document, one investor paid $5,000 for his 20,000 shares rather than the $10,000 that would be expected at $.50 per share. At some point, two clients purchased a total of an additional 20,000 Lifeplan shares at $.50 per share to increase the total proceeds of the offering to $105,000.
9/	Although the IRS filed the lien after Disraeli failed to pay $39,384.92 in taxes, it released the lien in a negotiated compromise after Disraeli paid $9,364.

5

Disraeli continued using the proceeds raised by the sale of Lifeplan shares. He states that, of the $85,000 that had been raised by early December 2003, he "loaned himself" $84,300 "to pay for both personal and business expenses." Disraeli's and Lifeplan's bank statements confirm that, between October 9, 2003 and December 23, 2003, Disraeli transferred $83,500 from Lifeplan's checking account directly into his personal bank account. 10/ These statements establish that, after Disraeli transferred the funds into his personal account, he made payments for personal expenses such as credit cards, groceries, pets, restaurants, and shopping. These statements also establish that Disraeli paid personal expenses with Lifeplan funds

directly out of Lifeplan's account. Disraeli himself created a document listing "personal expenses that [he] felt were not legitimate business expenses paid out of the corporate account." These payments included payments for coffee, ice cream, groceries, restaurants, and videos. When asked during investigative testimony why he used the Lifeplan account to pay personal expenses, Disraeli answered that he did not "have a good reason." Although Disraeli contends that some of the proceeds raised in the offering and expended from Lifeplan's account were used for business purposes, he concedes that he "did pay personal expenses out of Lifeplan checking accounts." 11/

Although Disraeli "thought [he] made adequate disclosures" in the October Memorandum, he provided investors with a second "Confidential Limited Offering Memorandum," dated December 9, 2003 (the "December Memorandum"), after he consulted a law firm and became "concerned about the possibility that a third-party regulator might take th[e] position" that his clients had not been fully informed about the use of the proceeds. The law firm prepared the December Memorandum as well as a rescission offer. 12/

Notwithstanding that Disraeli had started spending the proceeds of the offering after raising only $30,000, the December Memorandum represented that Lifeplan would hold and segregate the offering proceeds, for return to investors, until reaching the $50,000 minimum offering amount. It reiterated that Lifeplan would apply the offering proceeds to the operation of the

advisory business, to the creation of a partnership that would purchase distressed consumer

10/ Disraeli provided Commission staff with a document acknowledging these transfers and indicating that he also transferred an additional $800 from the Lifeplan account into his personal bank account for a total of $84,300.

11/ Lifeplan's bank statements indicate payments from the account for expenses that could be used for business purposes, such as Federal Express, Comp USA, and OfficeMax.

12/ Disraeli testified that "almost all" of the proceeds of the offering had been raised by the date of the December Memorandum. 6

debt, and to administrative and start-up expenses and working capital. 13/ It added that, due to "the number and variability of factors that determine the Company's use of the net proceeds of the Offering, the Company cannot assure [investors] that such uses will not vary from the Company's current intentions or that shareholders will agree with the uses it has chosen."

Neither offering memorandum disclosed either the transfer of $84,300 from Lifeplan's account into Disraeli's personal bank account or the use of proceeds from the offering for Disraeli's personal expenses. The offering memoranda also did not disclose either the existence of Disraeli's federal tax lien or the use of the proceeds of the offering to release that lien. Disraeli testified that, at the time of the December Memorandum, he did not feel it was necessary to inform his investors that he had

spent almost the totality of the money that they invested in Lifeplan. No investor funds were used for the purchase and collection of distressed consumer debt, and Lifeplan never launched any of the ventures contemplated in the offering memoranda.

In January 2005, Commission staff from the Division of Enforcement and the Office of Compliance, Inspections, and Examinations conducted a cause examination of Disraeli during which it noted the expenditure of $84,300 from the offering proceeds. In response, Disraeli produced an undated promissory note stating that he agreed to pay Lifeplan $84,300 plus interest from November 10, 2003. Disraeli testified that he "could have" executed the note around that November date. The law judge found, however, that the "evidence strongly suggest[ed] that Disraeli created the promissory note much later than November 10, 2003." With respect to his entire testimony, Disraeli's "many inconsistent and contradictory positions and [her] observation of his demeanor cause[d] [her] to conclude that Disraeli's testimony was not credible."

After the staff's examination, Disraeli wrote an undated letter to his "fellow shareholders" disclosing that he had "placed a large portion of the offering proceeds into [his] personal bank account" because "[b]y the time Lifeplan Associates, Inc was

operational [he] had personally absorbed approximately $25,000 in cash expenses attributable to the formation of the business." According to Disraeli, he "felt the need to create this [letter] when [he] heard the types of questions that [the Division of Enforcement] was asking [his] shareholders."

Two Lifeplan shareholders testified at the hearing. One shareholder, Nicholas Mallouf, testified that Disraeli's $84,300 loan from the proceeds of the Lifeplan offering did not disturb him because "there was no doubt in [Mallouf's] mind [Disraeli] was going to use [the Lifeplan offering] for personal operating expenses." Mallouf also signed an affidavit stating that it "was not material that a portion of the proceeds was used to satisfy a tax obligation, or any other

13/ The memorandum included a table "set[ting] forth the anticipated initial uses of the funds to develop the business." It assumed that $100,000 would be raised and included $18,000 for "personnel," $10,000 for "legal, other professional expenses," $2,000 for "capital expenditures," $12,000 for "management fee credits," and $58,000 for "working capital."

personal obligation." He signed further a "Shareholder Ratification and Release" "ratif[ying] any and all management decisions by David Disraeli regarding the use of offering proceeds." 14/

Ron Marek, another Lifeplan investor, testified at the hearing that he was not aware at the time of the offering that Disraeli was loaning the proceeds of the offering to himself, that it would have been important to him to know that fact before making his investment, and that he would not have chosen to invest in Lifeplan had he known this information. Marek's wife Lenese signed a declaration which mirrored her

husband's testimony. 15/ Marek now does not want Disraeli involved in his financial affairs in any respect.

Antifraud Violations

A. Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 forbid material misstatements or omissions in connection with the offer or sale of a security. 16/ "A statement is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding whether or not to invest his money in a particular security." 17/ "Violations of Section 17(a)(1), Section 10(b), and Rule 10b-5 require scienter." 18/ "Scienter is not an element of a Section 17(a)(2) or Section 17(a)(3) cause of action, however." 19/ "Scienter may be established by recklessness, defined as . . . an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it." 20/

We find that Disraeli and Lifeplan made material misstatements and omissions regarding the use of the offering proceeds. "The disposition of the proceeds of a securities offering is

14/	Several other Lifeplan investors signed affidavits and ratifications similar to Mallouf's.
15/	Although two other investors signed similar declarations, these investors also signed the "Shareholder Ratification and Release."

16/	SEC v. Phan, 500 F.3d 895, 907-08 (9th Cir. 2007).
17/	SEC v. Fife, 311 F.3d 1, 9 (1st Cir. 2002) (citing Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)).
18/	SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001).
19/	Meadows v. SEC, 119 F.3d 1219, 1226 n.15 (5th Cir. 1997).
20/	SEC v. Rubera, 350 F.3d 1084, 1094 (9th Cir. 2003); accord Rockies Fund, Inc. v. SEC, 428 F.3d 1088, 1093 (D.C. Cir. 2005); SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000); SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998); Meadows, 119 F.3d at 1226; SEC v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982).

material information, and issuers must adhere strictly to the uses for the proceeds described in [a private placement memorandum]." 21/ Disraeli did not devote the proceeds of the offering to the ventures contemplated in the offering memoranda or to the administrative and start-up expenses described therein. 22/ Instead, Disraeli lent himself proceeds of the offering to pay for the release of a personal tax lien against him and for other personal expenses.

Both offering memoranda represented that the minimum offering amount was $50,000. The December Memorandum further represented that Lifeplan would hold and segregate the offering proceeds until reaching the minimum offering amount. At the time the December Memorandum was written, however, Disraeli had already

transferred $12,000 of the first $30,000 raised in the offering into his personal bank account. The misrepresentation of the size of the offering and segregation and use of the offering proceeds and the failure to disclose the actual use of the proceeds constituted material misstatements and omissions. 23/

"[K]nowledge . . . is sufficient to satisfy [the scienter] requirement. 24/ Disraeli prepared and distributed the October Memorandum, and distributed the December Memorandum, which falsely described the use and disposition of the offering proceeds. Although the offering memoranda stated that the proceeds would be used for business expenses such as "working capital, legal fees[,] administrative fees[,] and other expenses" in connection with acquiring distressed consumer debt and starting a market neutral hedge fund, Disraeli transferred $84,300

21/ Brian Prendergast, 55 S.E.C. 289, 303 (2001).

22/ Although Disraeli contends that he had "discretion" to launch these ventures, the October Memorandum informed investors that Lifeplan "will form two limited partnerships, one a market neutral hedge fund and the other a fund to purchase charged off consumer debt."

23/ See SEC v. Randy, 38 F. Supp. 2d 657, 669 (N.D. Ill. 1999) (finding failure to disclose to investors the use of investor funds for

unrelated personal expenses material); Robert M. Fuller, 56 S.E.C. 976, 986 (2003) ("A reasonable investor would have wanted to know that such a substantial amount of the proceeds of the offering was not used in accordance with the purpose stated in the Registration Statement.") (citing Erik W. Chan, 55 S.E.C. 715, 725 (2002) ("Many of the misrepresentations in and omissions from these documents concerned issues fundamental to [issuer's] business, including . . . its intended use of the proceeds from the securities offerings. As such, the misrepresentations and omissions were material.")), petition denied, 95 Fed. Appx. 361 (D.C. Cir. 2004); DWS Sec. Corp., 51 S.E.C. 814, 818 (1993) (finding the "actual use of proceeds [] not adequately disclosed in the offering documents" where the bulk of the funds were used "to pay [Applicants'] personal expenses" rather than the uses stated in the documents).

24/ Graham v. SEC, 222 F.3d 994, 1004 (D.C. Cir. 2000); see also SEC v. U.S. Env't., Inc., 155 F.3d 107, 111 (2d Cir. 1998) ("It is well-settled that knowledge of the proscribed activity is sufficient scienter under § 10(b)."). 9

from Lifeplan's checking account into his personal account and "admitted that he loaned himself $85,000 to pay for both personal and [unspecified] business expenses." Disraeli did not disclose his actual use of the funds to his investors. The offering memoranda also stated that the minimum offering amount was $50,000 and that Lifeplan would hold and segregate the offering proceeds until reaching the $50,000 minimum, but Disraeli used the proceeds of the offering to cover a personal tax lien after raising only $30,000. Disraeli, therefore, knew that he informed investors that the proceeds would be

used for business expenses, that he did not use the proceeds in this manner, and that his investors did not know about his actual use of the funds. It is indisputable that Disraeli knew the falsity of the statements in the offering memoranda. We therefore find that Disraeli, and thus Lifeplan, 25/ acted with scienter. 26/

Although Disraeli admits that "the Lifeplan offering could have been handled differently" and that he "did pay personal expenses out of Lifeplan checking accounts and also paid business expenses out of his personal account," he contends that this accounting arrangement "is not fraud." Disraeli argues that he was entitled to borrow funds from the Lifeplan offering as reimbursement for expenses incurred by him and associated with forming Lifeplan. Neither offering memorandum, however, disclosed that he had advanced funds or that the proceeds from the offering would be used for this purpose. The October Memorandum states that "[t]he proceeds will be used for working capital, legal fees administrative fees and other expenses." The December Memorandum lists, under "Uses of Funds," personnel, legal and other professional expenses, capital expenditures, management fee credits, and working capital. Disraeli claims that he was "entitled to borrow or simply take up to $70,000 from the offering proceeds as specified in the offering documents for working capital and personnel expenses, especially since the registered

entity was then a sole proprietorship," but the offering memoranda stated that Lifeplan was a corporation and that Lifeplan would use the proceeds of the offering as described in the memoranda.

Although Disraeli also maintains that he "produce[d] evidence that all personal expenses paid from Lifeplan funds were added to the salary calculation to which he was/is entitled," Disraeli does not identify this purported evidence, and both offering memoranda, as well as Disraeli's employment agreement, stated that Disraeli would not receive a salary. Even if the

25/ "The scienter of a corporation's officers and directors establishes the scienter of the corporation for purposes of the antifraud provisions." Fuller, 56 S.E.C. at 987 n.26 (citing SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 n.16 (2d Cir. 1992)). 26/ See Lowry v. SEC, 340 F.3d 501, 506 (8th Cir. 2003) (finding that investment adviser's "plan[] to use [his investors'] funds for personal reasons without advising his investors or the Commission" satisfied the scienter requirement); Prendergast, 55 S.E.C. at 304 (finding that respondent acted with scienter because he was "actively involved with preparation of the [offering memorandum]," "knew of its provisions regarding the use of the offering proceeds," and "made the decision to change the disposition of the proceeds and did not disclose this decision to the investors"). 10 proceeds were actually used to

reimburse Disraeli for expenses, the failure to disclose this use would be a material omission. 27/

Disraeli also contends that he did not commit securities fraud because his investors "do not consider the alleged misstatements or omissions to be material." 28/ However, "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." 29/ "[T]he reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective." 30/ "[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." 31/

Although in general materiality is primarily a factual inquiry, "the question of materiality is to be resolved as a matter of law when the information is 'so

27/ Cf. Christopher A. Lowry, 55 S.E.C. 1133, 1140 (2002) (finding that, "[e]ven if there had been a valid 'loan,' [adviser] acted fraudulently because he failed to disclose that he had 'borrowed' or intended to 'borrow' investor funds for his personal use when he offered and sold [his company's] stock to his [advisory] clients"), aff'd, 340 F.3d 501 (8th Cir. 2003).

28/ Although Disraeli also contends that investors signed releases "ratif[ying] any and all management decisions by David Disraeli regarding the use of offering proceeds received by Lifeplan Associates, Inc.," investor ratifications do not absolve Disraeli from fraudulently departing from the stated use of the proceeds. See Lowry, 55 S.E.C. at 1140 (finding that the "fact that a majority of

the company's investors in the offering may have ratified [respondent's] purported 'loan' several months after he used the funds does not affect our authority to sanction him for conduct that violated the securities laws" where he departed from the stated use of the offering proceeds); Wilshire Disc. Sec., 51 S.E.C. 547, 551 (1993) (stating that "even assuming that certain investors ratified or endorsed [applicant's] action, that would not alter the objective fact that [he] fraudulently departed from the issuer's stated use of proceeds").

29/ TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976); see also Basic, 485 U.S. at 232 ("We now expressly adopt the TSC Industries standard of materiality for the § 10(b) and Rule 10b-5 context."); SEC v. Blatt, 583 F.2d 1325, 1331 (5th Cir. 1978) ("We should emphasize, however, that the test for materiality is objective.")(citing TSC Indus.).

30/ Richmark Capital Corp., Securities Act Rel. No. 8333 (Nov. 7, 2003), 81 SEC Docket 2205, 2211 (citing TSC Indus., 426 U.S. at 445); see also SEC v. Nat'l Student Marketing Corp., 457 F. Supp. 682, 708 (D.D.C. 1978) (stating that the materiality analysis "is an [o]bjective one, involving the significance of an omitted or misrepresented fact to a [r]easonable investor, not the significance of the information to various individual investors") (citing TSC Indus., 426 U.S. at 445).

31/ Basic, 485 U.S. at 240. 11
obviously important [or unimportant] to an investor, that reasonable minds cannot differ on the question of materiality.'" 32/ We find that a reasonable investor would want to know that Disraeli was diverting the proceeds of the offering to his own use, particularly when Disraeli claimed he was going to vastly increase assets under management and pay dividends. 33/

Disraeli also argues that "each Lifeplan shareholder invested based on their confidence in

Disraeli, not what was contained in the offering documents," and that "there is no causal relationship between any alleged violations and investor harm." However, "the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money." 34/ Although Disraeli contends further that "each investor[']s contribution was insignificant in light of their net worth," misrepresentations "cannot be excused because the amount of money involved is small and the

32/ SEC v. Cochran, 214 F.3d 1261, 1267 (10th Cir. 2000) (alteration in original) (citations omitted); see also TSC Indus., 426 U.S. at 450 ("Only if the established omissions are 'so obviously important to an investor, that reasonable minds cannot differ on the question of materiality' is the ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment.") (citation omitted); accord Phan, 500 F.3d at 908 (same); SEC v. Research Automation Corp., 585 F.2d 31, 35 (2d Cir. 1978) (same).

33/ See SEC v. Murphy, 626 F.2d 633, 653 (9th Cir. 1980) ("Surely the materiality of information relating to financial condition, solvency, and profitability is not subject to serious challenge."); SEC v. Smith, 2005 WL 2373849 (S.D. Ohio 2005) ("For certain, a reasonable investor would have considered Smith's omission that the majority of funds raised from the offerings would be spent on Smith's personal items and expenses for his other businesses instead of [in the manner described in private offering memorandums] a significant factor in determining whether to invest in the offerings."), aff'd, 208 Fed. Appx. 402 (6th Cir. 2006); SEC v. Better Life Club of Am., Inc., 995 F. Supp. 167, 177 (D.D.C. 1998) ("[N]o rational investor would knowingly invest in a project which never funded profitable ventures and which diverted substantial funds to the personal use of its promoters. Therefore, there is no question that defendants' frequent

misrepresentations and omissions were material."), aff'd, 203 F.3d 54 (D.C. Cir. 1999) (Table); Fuller, 56 S.E.C. at 976 (stating that a reasonable investor would have wanted to know that a substantial amount of the offering proceeds would not be used as described); City of Miami, 56 S.E.C. 317, 336 (2003) (stating that a reasonable investor would have wanted to know that Miami needed to use bond proceeds to satisfy operational expenses).

34/ SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985). 12 salesman believes the customer can afford the risk." 35/ Disraeli further asserts that his investors are sophisticated, but the sophistication of investors does not justify misleading them. 36/

Disraeli also cannot rely on the statement in the December Memorandum that due to "the number and variability of factors that determine the Company's use of the net proceeds of the Offering, the Company cannot assure [investors] that such uses will not vary from the Company's current intentions or that shareholders will agree with the uses it has chosen." "[I]n offering documents, specific statements control more general language such as that an allocation plan is 'flexible.'" 37/ A statement that the use of proceeds may vary from a company's current intentions cannot cure the diversion of offering proceeds from specific business expenses identified in offering memoranda to the personal use of the company's officers. 38/ Here, Disraeli provided the December Memorandum after having diverted proceeds of the offering to his personal use. The statement that the use of the proceeds could vary was itself misleading because he had already deviated from the use of the proceeds described in the memorandum. 39/ 35/ Alfred Miller, 43 S.E.C. 233, 238 (1966), aff'd sub nom. Freimark v. SEC, No. 31270 (2d Cir. Jan. 4, 1968), available at Fed. Sec. L. Rep. (CCH) ¶ 92,152.

36/ Everest Sec., Inc. v. SEC, 116 F.3d 1235, 1240 (8th Cir. 1997).

37/ Prendergast, 55 S.E.C. at 303.

38/ DWS Sec., 51 S.E.C. at 817-18 (rejecting reliance of company's president and vice-president on statements in private placement memorandum that they "would have some latitude in using the [] offering proceeds" where the memorandum "state[d] only that proceeds would be used for corporate expenses and acquiring and developing unspecified entertainment businesses" and did not "inform investors that Applicants would spend the bulk of investor funds on [Applicants'] personal expenses").

39/ Although Disraeli does not advance a reliance on counsel defense before us, he testified that a law firm prepared the December Memorandum, and he stated in his post-hearing brief that he "secured the services of reputable counsel to prepare an offering to cure deficiencies in the earlier documents." On the record here a reliance on counsel defense is not available. A claim of reliance on the advice of counsel requires a showing that the party claiming it "made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith." Markowski v. SEC, 34 F.3d 99, 104-05 (2d Cir. 1994) (citing SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981)). The record contains no evidence that Disraeli made complete disclosures to counsel regarding his use of the offering proceeds, that he received advice that his conduct was legal, and that he relied on any advice in good faith despite knowing that he did not intend to use the proceeds of the offering as described in either the October Memorandum or the December Memorandum. Disraeli fraudulently diverted the majority of the proceeds of the offering to his personal use, moreover, before consulting counsel. 13

Disraeli also testified that he was "under the impression that under a Reg D offering or a limited offering in Texas, there's no disclosure requirements, period." However, "Regulation D

transactions are exempt from the registration requirements of the Securities Act, not the antifraud provisions." 40/ "Though Regulation D offerings are subject to fewer requirements, affirmative misleading statements are not permitted." 41/ Disraeli decided to issue material statements in the offering memorandums. These statements, whether or not Regulation D required such disclosures, could not be false or misleading.

Accordingly, we find that Disraeli and Lifeplan willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5. 42/

B. "Advisers Act Section 206(1) provides that it is unlawful for an investment adviser 'to employ any device, scheme, or artifice to defraud any client or prospective client.'" 43/ Section 206(2) "prohibits any investment adviser from 'engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.'" 44/ The Advisers Act "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser -- consciously or unconsciously -- to render advice which was not disinterested." 45/ An investment adviser thus has "'an affirmative duty of 'utmost good faith, and full

and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." 46/

40/	Interpretive Release on Regulation D, Securities Act Rel. No. 6455 (Mar. 3, 1983), 27 SEC Docket 561, 565 n.26.
41/	Everest Secs., Inc., 52 S.E.C. 958, 963 (1996), aff'd in part and sanctions vacated in part, 116 F.3d 1235 (8th Cir. 1997).
42/	Willfulness means "intentionally committing the act which constitutes the violation" and does not require that the actor "also be aware that he is violating one of the Rules or Acts." Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Gearheart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).
43/	Vernazza v. SEC, 327 F.3d 851, 860 n.6 (9th Cir. 2003); 15 U.S.C. § 80b-6(1).
44/	Monetta Fin. Servs. v. SEC, 390 F.3d 952, 955 (7th Cir. 2004); 15 U.S.C. § 80b-6(2).
45/	SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92 (1963).
46/	Id. at 194.

Advisers Act Section 206 therefore "prohibits failures to disclose material information, not just affirmative frauds." 47/ Scienter is required for a Section 206(1) violation but need not be found for a violation of Section 206(2). 48/ "Facts showing a violation of [Securities Act] Section 17(a) or [Exchange Act Section] 10(b) by an investment advisor will also support a showing of a Section 206 violation." 49/ As discussed above, Disraeli made material misstatements and omissions with

scienter by misrepresenting the use of the proceeds of the offering to his advisory clients and failing to disclose to them that he planned to use the proceeds of the offering to pay personal expenses.

Although Disraeli states in his brief that he "was not a registered investment advisor during the initial offering of Lifeplan stock," Section 206 is not limited to registered investment advisers, 50/ and Disraeli concedes that he "has always been viewed as an investment advisor while he has been properly registered and while he wasn't."

Disraeli, moreover, stipulated that he is an investment adviser, and the record confirms that he acted as an investment adviser at the time of his misconduct. Advisers Act Section 202(a)(11) defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities." Disraeli's clients executed new advisory agreements after Disraeli formed Lifeplan. Disraeli stated that his clients "got a new agreement with a new fee schedule." The October Memorandum stated that Lifeplan would "charge 1.5% of assets under management." Although Disraeli was not charging his clients fees at the time he began the Lifeplan offering, he resumed charging fees during the offering period.

Disraeli, therefore, provided investment advice to his clients for compensation during the Lifeplan offering. He solicited investments in Lifeplan securities from those investment advisory clients. Disraeli thus acted as an investment adviser and willfully violated Advisers Act Sections 206(1) and (2). 51/

47/ SEC v. Washington Inv. Network, 475 F.3d 392, 395 (D.C. Cir. 2007).

48/ Capital Gains, 375 U.S. at 195; SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992); Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

49/ SEC v. Haligiannis, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007) (citing SEC v. Berger, 244 F. Supp. 2d 180, 188-89 (S.D.N.Y. 2001)).

50/ See Teicher v. SEC, 177 F.3d 1016, 1017-19 (D.C. Cir. 1999).

51/ See Alexander V. Stein, 52 S.E.C. 296, 299 (1995) ("Our authority to proceed under Section 203(f), however, does not rest on whether or not an entity or individual has registered with this Commission. It does rest on whether or not an entity or individual in
fact acted as an investment adviser. While Stein claims that there is insufficient evidence.
C. Advisers Act Section 206(4) prohibits an investment adviser from engaging in "'any act, practice, or course of business which is fraudulent, deceptive, or manipulative' and provides that the [Commission] shall promulgate rules

thereunder." 52/ Scienter is not required for violation of a rule promulgated under Section 206(4). 53/ Advisers Act Rule 206(4)-4(a)(1) provides that it is a fraudulent, deceptive, or manipulative act, practice, or course of business to fail to disclose to any client or prospective client all material facts with respect to the adviser's financial condition that are reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, if the adviser has discretionary authority or custody over such client's funds or securities, or requires prepayment of advisory fees of more than $500 from such client, six months or more in advance. 54/

Disraeli had discretionary authority over his client's funds and stipulated that he received more than $500 in fees more than six months in advance. He failed to disclose to his clients that the IRS had placed a lien on all property and rights to property belonging to him, that he planned to borrow investor funds for personal expenses, and that he would not devote all the proceeds of the offering to the operation of the advisory business as described in the offering memoranda. His IRS lien, his indebtedness to Lifeplan, and his diversion of Lifeplan funds to his personal use all were material facts that impacted his financial condition and his ability to meet his contractual commitments to his clients. Thus, Disraeli willfully violated Advisers Act Section 206(4) and Rule 206(4)-4(a)(1).

IV.

Commission Registration as an Investment Adviser

As noted, Disraeli was registered with the Commission as an investment adviser, as a sole proprietorship under the name Disraeli & Associates, from November 1993 until June 1997, when he withdrew his registration voluntarily after the National Securities Market Improvement Act of 1996 added Section 203A to the Advisers Act. That section generally prohibits an

51/ (...continued) on this record from which to conclude that he acted as an investment adviser, we cannot agree. The record reflects that Stein held himself out as an investment adviser to members of the public when he recommended, in the course of his business activities undertaken through the AVS companies he controlled, that clients invest their funds in his 'fully hedged arbitrage program.' Stein received the requisite compensation for his services when he subsequently diverted certain of these funds for his personal use.").

52/ Valicenti Adv. Servs. v. SEC, 198 F.3d 62, 64 n.4 (2d Cir. 1999); 15 U.S.C. § 80b-6(4).

53/ SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992).

54/ 17 C.F.R. § 275.206(4)-4(a)(1). 16

investment adviser from registering with the Commission unless it has more than $25 million of assets under management or is an adviser to a registered investment company. 55/

In July 1997, Disraeli registered David Henry Disraeli DBA Disraeli and Associates as an investment adviser with the Texas State Securities Board (the "TSSB"). Disraeli's TSSB registration lapsed on December 31, 2000. 56/ He continued, however, to conduct an advisory business. He also continued to collect fees until the autumn of 2002; he did not resume collecting fees for almost a year. Between the time his registration lapsed and the time he stopped collecting fees, Disraeli collected between $80,000-$90,000.

Disraeli stopped collecting fees at around the time that he became the subject of a TSSB disciplinary proceeding. On November 6, 2002, the TSSB issued an emergency cease-and-desist order against Disraeli and converted it to a cease-and-desist order on April 2, 2003. Disraeli consented to the April 2, 2003 order without admitting or denying wrongdoing. The TSSB's order required that Disraeli cease and desist from offering in Texas the securities of a proposed retirement community until the securities were registered or an exemption was available; from offering those securities in Texas through the use of fraud or an offer containing a statement that was materially misleading or otherwise likely to deceive the public; and from rendering services as an investment adviser in Texas until Disraeli registered with the state.

After Disraeli consented to the TSSB cease-and-desist order, "it was imperative that [he] find a way to get back in business" because, Disraeli asserted, he was not able to charge fees without registration. Disraeli therefore "filed a U-4 to become a registered principal with 1st Discount Brokers" on or about August 13, 2003. The TSSB opposed Disraeli's application to register with it as a registered representative of 1st Discount Brokerage, Inc. 57/

On October 8, 2003, after incorporating Lifeplan in September 2003, Disraeli filed a Form ADV registering Lifeplan with the Commission as an investment adviser. Disraeli had about twenty clients and $3.5 to $4 million in assets under management at this time. In Lifeplan's Form ADV, however, Disraeli claimed that Lifeplan satisfied Advisers Act Rule 203A-2(d), which allows a newly-formed investment adviser to register if it reasonably expects to qualify for Commission registration within 120 days. Disraeli represented that Lifeplan was a

55/ 15 U.S.C. § 80b-3a.

56/ Disraeli states that he failed to renew his TSSB registration because he was "in the middle of a family crisis" and acknowledges that this failure "was a highly irresponsible act."

57/ Disraeli reapplied in September 2005 but the TSSB again opposed his application.
Nonetheless, Disraeli's Central Registration Depository report indicates that he was registered with NASD as a registered representative of 1st Discount Brokerage, Inc. from August 2003 to April 2004 and from September 2005 to June 2006. 17 "newly formed adviser" and had a "reasonable expectation" that it would "be eligible to register with the SEC within 120 days after the date [its] registration with the SEC [became] effective."

As Disraeli had registered Lifeplan with the Commission identifying himself as Lifeplan's advisory representative (as opposed to the adviser), Texas law required Disraeli to register with the TSSB because Lifeplan had advisory clients in Texas. Around October 21, 2003, Disraeli submitted his advisory representative application to the TSSB. The TSSB notified Disraeli around November 12, 2003, that it opposed this application.

However, Texas law permits an individual that is registered with the Commission as an adviser to operate in Texas without registering with the state as an advisory representative. Accordingly, on November 13, 2003, Disraeli filed an amendment to the Form ADV that changed the name of the registered investment adviser to David Henry Disraeli DBA Lifeplan Associates and changed the organizational structure of the investment adviser from a corporation to a sole

proprietorship. Disraeli again claimed the Rule 203A-2(d) exemption for a newly-formed adviser. According to Disraeli, the "effective consequence was to allow [him] to operate in the State of Texas without hindrance from the [TSSB]."

Disraeli acknowledged that, in order to be remain registered with the Commission and therefore remain exempt from Texas registration requirements, he had to notify the Commission that he either had $25 million under management or satisfied one of the exemptions for registration by the conclusion of the 120-day period for satisfying Rule 203A-2(d), or February 5, 2004. However, Disraeli did not have $25 million under management by that date.

Accordingly, on February 13, 2004, Disraeli filed an amendment to the Form ADV stating that David Henry Disraeli DBA Lifeplan Associates was "a multi-state adviser" within the meaning of Advisers Act Rule 203A-2(e). Rule 203A-2(e) permits an adviser to register with the Commission if the adviser is required by the laws of thirty or more states to register as an adviser in those states. According to Disraeli, he satisfied this rule because he planned to "us[e] the Internet as an advertising medium" to solicit new clients. Although Disraeli admitted that state securities authorities told him that an adviser did not generally have to register with the state until the adviser had six clients in the state, 58/ Disraeli asserted that it was the "most cautious approach" "to assume . . . if you're

soliciting, talking to residents of a state, you should be registered in that state." Disraeli concluded that, because he was "actively soliciting their residents," he "would be required to register in" at least thirty states.

58/ Advisers Act Section 222(d) prohibits a state from requiring the registration of an investment adviser if the adviser does not have a place of business in the state and has had fewer than six clients who are residents of the state during the preceding twelvemonth period. 15 U.S.C. § 80b-18a; see also infra notes 67-69 and accompanying text.

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Disraeli filed additional amendments to the Form ADV claiming the multi-state adviser exemption on July 1, 2004, March 31, 2005, and November 9, 2005. 59/ At the time of all these filings, Disraeli's only office and all but one client were located in Texas.

Registration Violations

Section 203A of the Advisers Act prohibits an investment adviser from registering with the Commission unless it has more than $25 million of assets under management or otherwise qualifies for registration. 60/ However, Rule 203A-2(d) exempts an adviser from this prohibition if, at the time of registration, the adviser is not registered or required to be registered with the Commission or any state but has a reasonable expectation that it would be eligible for Commission registration within 120 days after the date its registration becomes effective. 61/ The Commission has stated that this rule "is designed to ensure that the exemption is available only to start-up advisers." 62/ Although various circumstances could support a reasonable expectation of Commission eligibility, the Commission

anticipated that the rule "would be used primarily by persons who start their own advisory firms after having been employed by or affiliated with other advisers, and that have received an indication from clients with substantial assets that they will transfer those assets to the management of the newly formed adviser." 63/

59/ Advisers Act Rule 204-1(a) requires an adviser to amend its Form ADV at least annually within ninety days of the end of the adviser's fiscal year. 17 C.F.R. § 275.204-1(a). The July 1, 2004 and March 31, 2005 amendments were annual amendments; the record does not indicate the purpose of the November 9, 2005 amendment.

60/ 15 U.S.C. § 80b-3a(a); Investment Advisers Act Rel. No. 1733 (July 17, 1998), 67 SEC Docket 1850, 1850.

61/ 17 C.F.R. § 275.203A-2(d); Advisers Act Rel. No. 2333 (Dec. 2, 2004), 84 SEC Docket 1087, 1096 n.107. Advisers Act Section 203A(c) authorizes the Commission to exempt advisers from the prohibition on Commission registration if the prohibition would be "unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes" of Section 203A. 15 U.S.C. § 80b-3a(c); Advisers Act Rel. No. 1633 (May 15, 1997), 64 SEC Docket 1525, 1530. The Commission has adopted exemptions under Rule 203A-2 from the prohibition on Commission registration. 17 C.F.R. § 275.203A-2; Advisers Act Rel. No. 2504 (Mar. 30, 2006), 87 SEC Docket 2276, 2276 n.1.

62/ 64 SEC Docket at 1531 n.69.

63/ Id. at 1531 n.68; Advisers Act Rel. No. 2028 (Apr. 12, 2002), 77 SEC Docket 1343, 1344 n.15 ("This rule was designed for use principally by new advisory firms that have been 'spun-off' from existing portfolio management firms and therefore can reasonably

expect to have at least $25 million in assets under management within 120 days.").

David Henry Disraeli DBA Lifeplan Associates, Disraeli's sole proprietorship, did not qualify as a newly-formed adviser because it was the successor to his previous sole proprietorship, Disraeli & Associates. We take official notice of Lifeplan's website which states that "Lifeplan Associates is the successor entity for Disraeli and Associates." 64/ Disraeli also stated in his investigative testimony that, "for the most part," David Henry Disraeli DBA Lifeplan Associates continued to serve as the investment adviser for the same people for whom Disraeli had been an investment adviser in 2000 before his registration lapsed. Disraeli stated at the hearing that he registered with the Commission as an investment adviser because, after the TSSB imposed the cease-and-desist order on him, "it was imperative that [he] find a way to get back in business." We reject Disraeli's contention that he "could not have continued the business of another adviser as none existed" because he was not "receiving any management fees from November of 2002 until November of 2003." The fact that Disraeli did not collect management fees for one year did not render David Henry Disraeli DBA Lifeplan Associates a newly-formed adviser. We agree with the law judge that "[t]he evidence compels the conclusion that Disraeli created Lifeplan and registered it with the Commission so that he could

continue to do business as an investment adviser without approval from the TSSB."

Disraeli, moreover, lacked a reasonable expectation that he would qualify for Commission registration within 120 days. He acknowledged that, absent an exemption, an investment adviser needed $25 million under management in order to qualify for registration with the Commission and that the maximum amount of assets under his management at any point in his career was $11 million. In his investigative testimony, Disraeli stated that, at the time he filed his Form ADV, he had had no discussions with potential clients that would increase his assets under management to $25 million. Disraeli acknowledged further that he "abandoned the hope of having 25 million probably within a month or two after the initial ADV filing."

Disraeli, however, claims that he qualified as a "multi-state" adviser. Rule 203A-2(e), which exempts investment advisers from the prohibition on Commission registration if the adviser is obligated to register in thirty or more states, 65/ permits a newly formed investment adviser to register with the Commission if it reasonably expects that it would satisfy this

64/ See 17 C.F.R. § 201.323 (stating that the Commission may take official notice "of any material fact which might be judicially noticed by a district court of the United States") and Fed. R. Evid. 201(b) (stating that a "judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); O'Toole v. Northrop

Grumman Corp., 499 F.3d 1218, 1225 (10th Cir. 2007)(stating that "[i]t is not uncommon for courts to take judicial notice of factual information found on the world wide web" and finding that the district court abused its discretion by not taking judicial notice of earnings data posted on Northrop Grumman's own website because "the information should not be subject to dispute by Northrop Grumman because Northrop Grumman created it").

65/ 17 C.F.R. § 275.203A-2(e). requirement within 120 days after the date its registration became effective. 66/ Advisers Act Section 222(d) provides that a state may not require an adviser to register with its state securities authority unless the adviser has a place of business in the state and has had, during the preceding twelve-month period, at least six clients who are residents of that state. 67/ We have stated that, "[i]n determining the number of states in which an adviser is required to register, the investment advisor would be required to exclude those states in which it is not obligated to register because of . . . section 222(d) of the Advisers Act (15 U.S.C. 80b-18a)." 68/

When Disraeli filed his Form ADV and subsequent amendments to that form, Disraeli's sole office and all but one client were in Texas. Thus, pursuant to Advisers Act Section 222(d), no state other than Texas could require Disraeli's registration during the relevant period. 69/ Disraeli concedes that state securities authorities advised him that he was not required to register until he had at least six clients in the state. Disraeli therefore lacked a reasonable expectation that he would satisfy the multi-state exemption when he filed his original Form ADV under Rule 203A-2(d), and did not satisfy the exemption when

he filed the subsequent amendments to the form claiming the exemption under Rule 203A-2(e).

Disraeli notes that Rule 203A-2(f) exempts advisers from the prohibition on Commission registration if the adviser provides investment advice to its clients exclusively through an interactive website. 70/ As he observes, the Commission recognized that "[b]ecause an Internet

66/ 67 SEC Docket at 1851-52.

67/ 15 U.S.C. § 80b-18a; Advisers Act Rel. No. 2333 (Dec. 2, 2004), 84 SEC Docket 1087, 1110 n.268.

68/ 67 SEC Docket at 1852 n.17.

69/ Disraeli criticizes the law judge's decision for failing to provide "any discussion about the rules of any single individual state" and argues that "[t]he fact that NSMIA created a national de minimis standard is not dispositive on whether any state can find a way to require registration by a legislative work-around." However, Advisers Act Section 222(d) provides specifically that state investment adviser statutes are "inapplicable to advisers that do not have a place of business in the state and have fewer than six clients who are residents of that state." Advisers Act Rel. No. 1794 (Mar. 25, 1999), 69 SEC Docket 1185, 1186 n.9.

70/ 17 C.F.R. § 275.203A-2(f); Advisers Act Rel. 2091 (Dec. 12, 2002), 79 SEC Docket 434,
435. An "interactive website" is a "website in which computer software-based models or applications provide investment advice to clients based on personal information

each client supplies through the website." 17 C.F.R. § 275.203A-2(f)(2); see also 79 SEC Docket at 435.

(continued...)
Investment Adviser uses an interactive website to provide investment advice, the adviser's clients can come from any state, at any time, without the adviser's prior knowledge. . . . Consequently, these advisers would be required, absent an exemption, to register in every state." 71/

Although Disraeli admits that he did not satisfy Rule 203A-2(f) because he did not employ an interactive website, he contends that he, like Internet investment advisers, could obtain clients from any state, at any time, because he "us[es] the Internet as an advertising medium" to solicit clients. Disraeli argues that, as a result, he is entitled to the multi-state adviser exemption because he would not "know if and when [he would] reach the sixth client, which would require state registration."

This claim is not persuasive. The multi-state exemption is not available "until the adviser obtain[s] the requisite number of clients in thirty states to trigger its registration obligations in those states." 72/ State securities authorities informed Disraeli that he did not have to register in a state until he obtained six clients in that state, and Disraeli was never near having six clients in each of thirty states. Individuals responding to Disraeli's

Internet solicitations could not become his clients without his knowledge. In adopting the Internet investment adviser exemption, we stated that it is "not available to advisers that merely use websites as marketing tools," and that "expansion of the rule to include such activities . . . could undermine NSMIA's allocation of regulatory responsibility over smaller advisers to state securities authorities." 73/ It would be similarly inappropriate to expand the application of the multi-state adviser exemption based on the solicitation of clients in several states through the Internet.

Accordingly, we find that Disraeli willfully violated Advisers Act Section 203A. Advisers Act Section 207 prohibits "willfully making false statements of material fact, or material omissions, in applications or reports to the Commission, such as a Form ADV." 74/

70/ (...continued)
Rule 203A-2(f) includes an exception that would permit an adviser relying on the rule to advise clients through means other than its interactive website, so long as the adviser had fewer than fifteen of these non-Internet clients during the preceding twelve months. 17 C.F.R. § 275.203A-2(f); 79 SEC Docket at 435. Disraeli conceded that he had too many "real clients" to satisfy this exception.

71/ 79 SEC Docket at 435 (emphasis in original).

72/ Id. at 435 n.13.

73/ Id. at 435.

74/ Vernazza, 327 F.3d at 858 (citing 15 U.S.C. § 80b-7). 22 Scienter need not be found to support a Section 207 violation. 75/ As discussed, Disraeli made material misstatements in his Forms ADV by misrepresenting that he satisfied the requirements for Commission registration and thus also willfully violated Advisers Act Section 207. 76/

V.

Disraeli's Books and Records

Commission staff conducted an examination of Disraeli from January 10-14, 2005. The staff called Disraeli one week before the examination and provided him with a list of documents that Disraeli should have available for inspection. This list included those books and records that Advisers Act Section 204 and the rules thereunder require an investment adviser to keep. 77/ Advisers Act Rules 204-2(a)(1), (2), and (6) require, respectively, that investment advisers make and keep true, accurate, and current (1) journals, including cash receipts and disbursements, records, and any other records of original entry forming the basis of entries in any ledger;
(2) general and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital income and expense accounts; and
(3) trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser. 78/

Disraeli did not produce all the requested records during the staff's examination. He was

unable to produce the financial records required to be kept by Advisers Act Rule 204-2(a)(1) for 2004. Although he did provide financial records required to be kept by that rule for the 2003 fiscal year, the evidence indicates that those records were not true and accurate and were not kept up to date. Testimony at the hearing confirmed that Disraeli was "missing a lot of entries that he supposedly made with personal money," that entries "consisted of bills paid out of the corporate account that were personal bills," and that Disraeli had an entry for goodwill but "it was impossible to have an entry of goodwill" because Disraeli had not bought a company. Also, Disraeli apparently only updated his books once a year. The records that Disraeli provided that were required to be kept by Advisers Act Rule 204-2(a)(2) contained "many erroneous postings." Disraeli provided the staff records required to be kept under Advisers Act Rule 204-2(a)(6) for 2003 but was unable to produce any financial records or trial balances for 2004.

75/ Id. at 860.

76/ The law judge did not "give[] any weight to the Division's claim that Disraeli violated
Section 207 by failing to report the [TSSB's] Cease-and-Desist Order in his Forms ADV."
Although the Division notes this failure in its brief, it did not appeal the law judge's

finding. Thus, that issue is not before us. George J. Kolar, 55 S.E.C. 1009, 1011 (2002).

77/ 15 U.S.C. § 80b-4.

78/ 17 C.F.R. § 275.204-2(a)(1), (2), (6). 23
Moreover, the books and records that Disraeli produced were not accurate. Disraeli did not have adequate back-up documentation for the figures in the firm's books and records. Disraeli intermingled his business and personal accounts, paid personal bills out of the business account and business bills out of the personal account, and failed to make journal entries to reflect those transactions.

Books and Records Violations

Section 204 of the Advisers Act requires that investment advisers make and keep records and furnish copies of such records as prescribed by the Commission. 79/ The undisputed record evidence establishes that for 2003 and 2004 Disraeli failed to make, keep, and furnish all the records required by Advisers Act Rules 204-2(a)(1), (2), and (6), promulgated pursuant to Section 204.

Disraeli contends on appeal that he "provided 2004 records after his exam which became Stipulated Exhibit 28." This exhibit is an undated one-page document entitled Lifeplan "Profit and Loss 1/1/04 to 12/31/04." Although this document might be considered part of the financial statements required to be kept pursuant to Rule 204-2(a)(6), Disraeli did not provide it to the staff at

the time of the exam. Nor does it satisfy the requirements that Disraeli also keep journals and ledgers. Assuming, moreover, that the profit and loss statement was complete and accurate, financial statements generally include, among other things, a balance sheet. We therefore reject the contention that the one-page profit and loss statement alone fulfilled the requirements of Advisers Act Section 204 for the year 2004.

"The requirement that records be kept embodies the requirement that those records be true and accurate." 80/ Disraeli does not dispute the record evidence demonstrating the deficiencies in the books and records described above. Respondents' counsel admitted at the hearing that "there were some books-and-records sloppiness," Respondents admitted in their post-hearing brief that "some of the required information was not 'readily-accessible,'" and Respondents admitted in their brief before the Commission that Disraeli "did not keep all the books and records that were required." Accordingly, we find that Disraeli willfully violated Advisers Act Section 204 and Advisers Act Rules 204-2(a)(1), 204-2(a)(2), and 204-2(a)(6). 81/

79/ 15 U.S.C. § 80b-4; SEC v. Slocum, Gordon & Co., 334 F. Supp. 2d 144, 179 (D.R.I. 2004) ("Section 204 requires a registered investment adviser to 'make and keep' such records 'as the Commission, by rule, may prescribe as

necessary or appropriate in the public interest or for the protection of investors.'").

80/ Anthony A. Adonnino, 56 S.E.C. 1273, 1288 (2003), aff'd, 111 Fed. Appx. 46 (2d Cir. 2004).

81/ See The Barr Fin. Group. Inc., 56 S.E.C. 1243, 1258 (2003) (stating that "the finding that respondents violated Advisers Act Section 204 is, as is made clear by our factual (continued...) 24

VI.

Revocation of Registration and Bar from Association

Advisers Act Section 203 provides that the Commission may revoke the registration of registered advisers or bar association with advisers as penalties for making false material statements. 82/ Exchange Act Section 15(b)(6)(A) provides that the Commission may bar a person associated or seeking association with a broker or dealer from association with a broker or dealer if the person willfully violated the federal securities laws and such sanction is in the public interest. 83/ As noted, during the time of his misconduct, Disraeli was associated or seeking association as a registered representative of 1st Discount Brokerage, Inc.

We consider "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future inadequate, continued to

make these misrepresentations and omissions in the December Memorandum. He also filed several forms that violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." 84/ "[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive." 85/

We find that it is in the public interest to bar Disraeli from association with an investment adviser, a broker, and a dealer. Disraeli acted egregiously and with a high degree of scienter. As noted above, Disraeli prepared and distributed offering memoranda to his advisory clients stating that the proceeds of the offering would be used for business purposes. Instead, Disraeli lent himself the proceeds from the offering and diverted proceeds for his own personal use without disclosing this information to his investors. Disraeli, moreover, committed repeated violations. He made material misrepresentations and omissions regarding the use of the proceeds of the offering in the October Memorandum and, after realizing that the October Memorandum was misrepresented that he qualified for Commission

81/ (...continued)

findings, supported independently by the consistent accounts of the several Commission employees who testified at the hearing and who were credited by the law judge").

82/ 15 U.S.C. § 80b-3(e), (f); Vernazza, 327 F.3d at 862.

83/ 15 U.S.C. § 78o(b)(6)(A), (4)(D); Irfan Mohammed Amanat, Securities Exchange Act Rel. No. 54708 (Nov. 3, 2006), 89 SEC Docket 714, 733, appeal pending, No. __ (3dCir.).

84/ Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

85/ Conrad P. Seghers, Advisers Act Rel. No. 2656 (Sept. 26, 2007), __ SEC Docket __, __. 25

registration. Throughout this period, Disraeli failed to maintain books and records in compliance with Commission rules. Disraeli's misappropriation of the offering proceeds obtained from his clients, his repeated attempts to register with the Commission despite his failure to qualify, and his failure to maintain accurate books and records suggest that he poses a threat to the investing public if allowed to remain in the securities industry. 86/

The TSSB's cease-and-desist order further demonstrates the necessity of a severe sanction to prevent Disraeli from committing future violations. The TSSB order was specifically directed at the failure to properly register as an adviser and the use of fraud in the offer of securities. Disraeli committed the antifraud and registration violations while subject to that order. Disraeli's misconduct in the face of the cease-and-desist order demonstrates the likelihood of future violations and the necessity of imposing a bar.

The law judge noted that "Disraeli gave no persuasive assurances against future violations or any indication that he recognizes that he committed serious violations." Disraeli admits that the law judge "is correct in that Disraeli showed no signs of remorse." According to Disraeli, his "defense is that there were no fraud violations, therefore remorse would be inconsistent with this defense." We have found, however, that Disraeli committed serious violations of the antifraud, registration, and books and records provisions of the securities laws. Accordingly, Disraeli demonstrates either a misunderstanding or a lack of recognition of his obligation to provide full and fair disclosure of all material facts and his affirmative duties as an investment adviser. 87/

These specific factors provide compelling reasons for a bar. 88/ We reject Disraeli's contention that "a bar from association with a registered entity is far too harsh and provides no protection for future investors in Respondents' business projects." A bar provides necessary protection for future investors. "Absent a bar, there would be no obstacle to [Disraeli's] associating with another investment adviser or broker-dealer that would neither restrict his conduct nor his access to funds." 89/

Disraeli also asserts that "Lifeplan shareholders have not been harmed, they will only

be harmed if the sanctions that the [law judge] ordered are affirmed." Disraeli's clients, however, remain free to find another investment adviser. The Commission has an obligation to protect the

86/ Lowry, 340 F.3d at 505-06 (affirming bar where investment adviser used his clients' funds for personal expenses).

87/ Seghers, ___ SEC Docket at ___.

88/ See Steadman, 603 F.2d at 1140.

89/ Bradley T. Smith, Exchange Act Rel. No. 55771 (May 16, 2007), 90 SEC Docket 1989, 1998-99. 26

investing public. 90/ Lifeplan investors, moreover, suffered harm. Marek testified that he did not receive his $10,000 investment back, and Disraeli acknowledged that no investors received checks from him returning their investment. Although Disraeli also asserts, without verifying documentation, that he "paid back a portion of the loan early," no evidence suggests that he repaid the entire loan, plus interest, as required by the terms of the undated promissory note. In any event, Disraeli's repayment of funds after the fact would not excuse his misconduct. 91/

Conduct that violates the antifraud provisions "is especially serious and subject to the severest of sanctions." 92/ As described above, we agree with the law judge that there is a "high probability that, if allowed to remain in the securities industry, Disraeli will commit future violations." Thus, we find it in the public interest

to bar Disraeli from association with a broker, dealer, and investment adviser and to revoke Disraeli's investment adviser registration. 93/

Cease-and-Desist Order

"Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) each authorize the Commission to impose a cease-and-desist order if it finds that any person has

90/ See Lowry, 55 S.E.C. at 1145. Disraeli notes that several clients "signed affidavits swearing that they are aware of the [Division of Enforcement's] issues and refuse to rescind their investment." Although we have considered this evidence, we believe that the conduct established in the record demonstrates the need to protect the public by barring Disraeli. Id. at 1145 n.26 (noting that "several former or current [investment advisory] clients expressed their satisfaction with Lowry's investment advisory services and criticized the Division's action against him" but finding that "the conduct established in the record demonstrates the need to protect the public by barring Lowry").

91/ Id. at 1142 (rejecting respondent's contention that his conduct "was not egregious because none of his advisory clients lost money as a result of his actions" because his "repayment of funds after the fact would not have excused his initial misrepresentations").

92/ Marshall E. Melton, 56 S.E.C. 695, 713 (2003).

93/ Respondents argue that they "can not find any Commission actions which resulted in sanctions as harsh

as the instant case outside of parallel civil or criminal actions." We have, however, previously sanctioned violations of the antifraud provisions by revoking the registration of the investment adviser and imposing a bar from association with any investment adviser, broker, and dealer. See, e.g., John J. Kenny, 56 S.E.C. 448 (2003), aff'd, 87 Fed. Appx. 608 (8th Cir. 2004). In any case, "[t]he employment of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." Rooms v. SEC, 444 F.3d 1208, 1215 (10th Cir. 2006) (alteration in original) (citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973)). 27

violated or caused violations of the federal securities laws or rules thereunder." 94/ We impose cease-and-desist orders only where there is some risk of future violations. 95/ We also consider, in addition to the factors mentioned above, the remedial function to be served by a cease-and desist order in the context of other sanctions sought in the proceeding. 96/

We believe, as stated above, that there is a high probability of future violations here. "In view of Respondents' failure to appreciate their obligation to deal honestly with public investors and to understand important regulatory requirements, there is a risk that they will transgress in the future." 97/ The cease-and-desist order is the only sanction sought against Lifeplan and is therefore necessary to protect the public. As for Disraeli, although we have ordered that his investment adviser registration be revoked and that he be barred from association with a broker, dealer, and investment adviser, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging him to take his responsibilities more seriously in the future should he ever be allowed to reenter the industry. 98/ Disraeli himself notes, moreover, that "[o]ne need not be an investment adviser to misappropriate corporate funds." The antifraud provisions of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 "apply to securities transactions by 'any person.'" 99/ A cease-and-desist order is therefore necessary to protect the public against future violations that Disraeli could commit without being an investment adviser or associated person of a broker-dealer. Accordingly, we find it is in the public interest to order that Disraeli and Lifeplan cease

and desist from committing or causing any violations or future violations of Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, and that Disracli cease and desist from committing or causing any

94/ Kenny, 56 S.E.C. at 490.

95/ KPMG Peat Marwick, LLP, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 55 S.E.C. 1 (2001), petition denied, 289 F.3d 109 (D.C. Cir. 2002).

96/ Ira Weiss, Securities Act Rel. No. 8641 (Dec. 2, 2005), 86 SEC Docket 2588, 2611-12, petition denied, 468 F.3d 849 (D.C. Cir. 2006).

97/ Fundamental Portfolio Advisors, Inc., 56 S.E.C. 651, 693-94 (2003), petition denied, 167 Fed. Appx. 836 (2d Cir. 2006).

98/ See Rizek v. SEC, 215 F.3d 157, 161 (1st Cir. 2000) ("We also note that the term 'permanent bar' is more than a bit of a misnomer. It does not literally mean that the sanctioned person may never reenter the securities industry."); cf. Vladlen Larry Vindman, Securities Act Rel. No. 8679 (Apr. 14, 2006), 87 SEC Docket 2626, 2648 (stating that, "[a]lthough we have ordered a penny stock bar and the payment of a civil penalty, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging Vindman to take his responsibilities more seriously in the future").

99/ Cady, Roberts & Co., 40 S.E.C. 907, 911 (1961). 28 violations or future violations of Advisers Act Sections 203A, 204, 206(1), 206(2), 206(4), and 207, and Rules 204-2(a)(1), 204-2(a)(2), 204-2(a)(6), and 206(4)-(4)(a)(1) thereunder.

Disgorgement

Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) authorize the Commission to require disgorgement, including reasonable interest, in a cease-anddesist proceeding. 100/ "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws." 101/ "[T]he amount of disgorgement should include 'all gains flowing from the illegal activities.'" 102/ "[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation." 103/ "Once the [Division] shows that the disgorgement is a reasonable approximation, the burden shifts to the defendant to demonstrate that the amount of disgorgement is not a reasonable approximation." 104/ "The risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." 105/

The Division requests that we order Disraeli to disgorge $84,300, or "all ill-gotten offering proceeds that he applied to personal expenses, plus prejudgment interest." This figure reasonably approximates Disraeli's unjust enrichment. Disraeli acknowledges that he borrowed $84,300 of the offering proceeds, and the record documents personal expenses paid with Lifeplan funds. As the law judge noted, Disraeli does not "offer a specific

alternative to the Division's disgorgement amount." Disraeli claimed in July 2005, and at the hearing in August 2006, that he had repaid approximately $20,000. In his financial statements submitted to the Commission in connection with this appeal, he claims that he has repaid approximately $32,000. Disraeli, however, does not provide documentation verifying these assertions, and, as noted, he carries the burden of doing so. We thus order Disraeli to disgorge $84,300, plus prejudgment interest. 106/

101/	SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).
102/	SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1114 (9th Cir. 2006).
103/	SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995) (citing First City Fin., 890 F.2d at 1231).
104/	SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004) (citing First City Fin., 890 F.2d at 1232).
105/	Id. (citing First City, 890 F. 2d at 1232; Patel, 61 F.3d at 140).
106/	Repayments that Disraeli proves he made could offset his disgorgement. See SEC v. Palmisano, 135 F.3d 860, 863-64 (2d Cir. 1998) (modifying judgment "to provide that to the extent that Palmisano pays or has paid restitution as ordered in the criminal judgment, such payments will offset his disgorgement obligation under the present judgment").

29

Disraeli contends that "[d]isgorgement is clearly inappropriate where the alleged victims are opposed to receiving disgorged funds." However,

"[t]he primary purpose of disgorgement is not to refund others for losses suffered but rather 'to deprive the wrongdoer of his ill-gotten gain.'" 107/ Disgorgement ensures "that wrongdoers will not profit from their wrongdoing." 108/

Civil Money Penalty

Exchange Act Section 21B and Advisers Act Section 203(i) authorize the Commission to impose a first-tier civil money penalty if a respondent has willfully violated any provision of the Securities Act, the Exchange Act, the Advisers Act, or the rules and regulations thereunder, and such penalty is in the public interest. 109/ We may impose a second-tier penalty if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 110/ A third-tier penalty is authorized if the violation also "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed" the violation. 111/

In considering whether a penalty is in the public interest, we consider whether the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; the harm to other persons resulting either directly or indirectly from such act or omission; the extent to which any person was unjustly enriched, taking into account any

restitution made to persons injured by such behavior; whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the federal securities laws, state securities laws, or the rules of a self-regulatory organization, or has been enjoined from or convicted of committing such violations by a court; the need to deter such persons and other persons from committing such acts or omissions; and such other matters as justice may require. 112/

107/	SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (citation omitted); see also SEC v. Fischbach Corp., 133 F.3d 170, 175-76 (2d Cir. 1997) (approving disgorgement "regardless of whether the disgorged funds will be paid to . . . investors as restitution").
108/	SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987); see also SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978) (Friendly, J.) (stating that the "primary purpose of disgorgement is not to compensate investors" but "is a method of forcing a defendant to give up the amount by which he was unjustly enriched").
109/	15 U.S.C. §§ 78u-2, 80b-3(i).
110/	Id. §§ 78u-2(b)(2), 80b-3(i)(2)(B).
111/	Id. §§ 78u-2(b)(3), 80b-3(i)(2)(C).
112/	Id. §§ 78u-2(c), 80b-3(i)(3).

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We believe that Disraeli's misconduct warrants a third-tier civil money penalty of $85,000, approximately the amount of Disraeli's unjust enrichment. 113/ Disraeli's misconduct involved fraud, deceit, and a deliberate or reckless disregard of numerous regulatory requirements because he knowingly used the proceeds of the Lifeplan offering for his own personal use after representing that he would use the proceeds for Lifeplan business expenses. The failure to use the proceeds for the business purposes described in the offering memoranda created a significant risk of substantial losses for investors who had invested their money in Lifeplan. Disraeli's personal use of the proceeds of the Lifeplan offering also resulted in substantial pecuniary gain to himself because he used the funds to pay for the release of a personal tax lien against him and other personal expenses. Disraeli obtained approximately $85,000 of Lifeplan's funds through his fraudulent conduct. He committed the misconduct here, which involved violations of federal antifraud and registration provisions, after he had been ordered by the TSSB to cease and desist from rendering services as an investment adviser without registration and from offering securities in a manner that the TSSB found fraudulent. We therefore impose one third-tier penalty of $85,000. 114/

Inability to Pay

On appeal to the Commission, Disraeli contends that "Respondents cannot repay the disgorgement and penalty amounts." Disraeli submits a sworn financial statement pursuant to Commission Rule of Practice 630(b). Rule 630(b)

provides that a "respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement and to keep the statement current." 115/ Disraeli's sworn financial statement consists of a balance sheet listing his assets, liabilities, and net worth as of May 25, 2007, and a list of all income and expenses from October 1, 2003 through May 17, 2007. 116/

113/ 17 C.F.R. § 201.1002.

114/ Although Disraeli does not address the civil money penalty in his brief to the Commission, he contended in his post-hearing brief that civil money penalties "are warranted when flagrant misconduct has occurred" and that "his conduct was neither flagrant nor of such a degree to warrant such a severe penalty." To the contrary, as required by the statutory criteria, Disraeli's misconduct involved a deliberate or reckless disregard of numerous regulatory requirements and substantial pecuniary gain to himself.

115/ 17 C.F.R. § 201.630(b).

116/ Rule of Practice 410(c) provides that any person who files a petition for review of an initial decision that asserts an inability to pay disgorgement, interest, or a penalty shall file with the opening brief a sworn financial disclosure statement containing the information specified in Rule 630(b). 17 C.F.R. § 201.410(c). 31

Disraeli's balance sheet indicates that his net worth is slightly less than the combined disgorgement and civil penalty amount. 117/

Disraeli has waived his right to assert the defense of an inability to pay because he did not raise the issue before the law judge below. Rule 630(b) contemplates that the respondent will have raised the issue of an inability to pay before the law judge. 118/ We have held previously that "an argument regarding a respondent's inability to pay may be waived if not raised before the law judge." 119/ We have also stated that where "a respondent raises the issue of inability to pay but fails to adduce at the earliest available opportunity material evidence of his then-current financial position, Rule of Practice 452 would appear to govern the terms under which additional evidence on the same issue may be considered by the Commission." 120/ Rule 452 requires that the additional evidence "is material and that there were reasonable grounds for failure to adduce such evidence previously." 121/ Disraeli does not suggest any reasonable grounds for his failure to adduce financial information before the law judge. 122/

In any event, Disraeli provides no supporting documentation, such as tax returns, to corroborate his asserted financial information, as required by 17 C.F.R. § 209.1. The valuation of Disraeli's assets and liabilities on his balance

sheet cannot be verified. The balance sheet, moreover, contains only vague descriptions of his assets and liabilities, such as assets consisting of "personal effects" and liabilities consisting of "law firms." Disraeli's list of income and

117/ We granted in part Disraeli's request for a protective order for these documents, but we stated that "disclosure of certain information included in the documents will be necessary to the resolution of the issues before us."

118/ Terry T. Steen, 53 S.E.C. 618, 627 (1998) (rejecting respondent's argument that under the language of Rule 630 he had "discretion whether to provide a financial statement before the law judge" because "[g]iven the respondent's burden of demonstrating inability to pay, financial information supporting that argument must be presented before the law judge").

119/ Dolphin and Bradbury, Inc., Securities Act Rel. No. 8721 (July 13, 2006), 88 SEC Docket 1298, 1322 (citing Brian A. Schmidt, 55 S.E.C. 576, 597 (2002)), appeal pending, No. 06-1319 (D.C. Cir.); Steen, 53 S.E.C. at 628 (stating that "we may consider that a respondent who fails to introduce material evidence of inability to pay before the law judge has waived this issue").

120/ Steen, 53 S.E.C. at 628.

121/ 17 C.F.R. § 201.452.

122/ Steen, 53 S.E.C. at 628 (finding that respondent "failed to make the showing required by Rule 452" because although the documents he submitted were "clearly material" he did

"not suggest any reasonable grounds for the failure to adduce comparable financial information earlier").

expenses contains similarly vague descriptions of the amounts received and expended. For example, Disraeli describes an expense of $52,057 as "miscellaneous" and an expense of $19,928 as "payment." Disraeli also does not break down his income and expenses by year but includes one statement for a three-and-a-half year period. The vague and unsubstantiated nature of Disraeli's disclosures renders them neither adequate nor credible as a basis for reducing the disgorgement or penalty amounts. 123/

Moreover, "[e]ven when a respondent demonstrates an inability to pay, we have discretion not to waive the penalty, particularly when the misconduct is sufficiently egregious." 124/ Disraeli's misconduct is sufficiently egregious, as discussed above with respect to the imposition of the bar and revocation of registration, that it outweighs any financial information submitted by Disraeli at this late date. Ordering disgorgement and a civil penalty is necessary to deter others from misappropriating offering proceeds and from registering with the Commission without satisfying the standards for Commission registration. 125/

Fair Fund

The law judge ordered that "the amount of disgorgement and civil money penalties be used to create a fund for the benefit of Lifeplan investors who were harmed by the violations,"

123/	See Philip A. Lehman, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 549 (finding respondent's evidence of inability to pay "neither adequate nor credible because his assertions variously are vague, unsubstantiated, inconsistent, or contradicted by reliable evidence").
124/	Lehman, 89 SEC Docket at 543.
125/	Cf. Schmidt, 55 S.E.C. at 600 (finding that, although respondent's "financial statements, on their face, indicate that he is impecunious, the egregiousness of his conduct outweighs any consideration of his ability to pay"); Charles Trento, Securities Act Rel. No. 8391 (Feb. 23, 2004), 82 SEC Docket 785, 793 ("Even accepting [respondent's] financial report at face value, we find that the egregiousness of his conduct far outweighs any consideration of his present ability to pay a penalty."); see also Lehman, 89 SEC Docket at 549 ("Further considerations affecting our decision not to reduce or waive the penalty include [respondent's] recidivism and our view that his misconduct is egregious.").

pursuant to Rule of Practice 1100. 126/ "Sarbanes-Oxley's Fair Fund provision provides the [Commission] with flexibility by permitting it to distribute civil penalties among defrauded investors by adding the civil penalties to the disgorgement fund." 127/ We direct that the civil money penalties and disgorgement amounts ordered in this matter be paid into such a fund.

An appropriate order will issue. 128/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH, and CASEY).

Nancy M. Morris
Secretary

126/	17 C.F.R. § 201.1100.
127/	Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC, 467 F.3d 73, 82 (2d Cir. 2006) (citing Section 308(a) of the Sarbanes-Oxley Act, 15 U.S.C. § 7246(a)).
128/	We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA before the
SECURITIES AND EXCHANGE COMMISSION
SECURITIES ACT OF 1933 Rel. No.
8820 / December 21, 2007

SECURITIES
EXCHANGE ACT OF
1934 Rel. No. 57027 /
December 21, 2007

INVESTMENT
ADVISERS ACT OF
1940 Rel. No. 2686 /
December 21, 2007

Admin. Proc. File No. 3-12288

In the Matter of

DAVID HENRY DISRAELI and LIFEPLAN ASSOCIATES, INC.

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that the investment adviser registration of David Henry Disraeli DBA Lifeplan Associates, Inc. be, and it hereby is, revoked; and it is further

ORDERED that David Henry Disraeli be, and he hereby is, barred from association with any broker, dealer, or investment adviser; and it is further

ORDERED that Disraeli disgorge $84,300, and prejudgment interest of $25,519 from October 9, 2003, as calculated in accordance with Commission Rule of Practice 600; and it is

further

ORDERED that Disraeli pay a civil money penalty of $85,000; and it is further

ORDERED that the disgorgement and civil money penalty be used to create a "Fair Fund"

for the benefit of investors pursuant to Commission

Rules of Practice 1100-1106; and it is further

ORDERED that the Division of Enforcement submit to the Commission a proposed plan for the administration and distribution of funds in the Fair Fund established in this order no later 2

than sixty days after payment of the amounts due and any appeals of this Order have been waived or are no longer available; and it is further

ORDERED that Disraeli cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 203A, 204, 206(1), 206(2), 206(4), and 207 of the Investment Advisers Act of 1940 and Rules 204-2(a)(1), 204-2(a)(2), 2042(a)(6), and 206(4)-4(a)(1) thereunder; and it is further

ORDERED that Lifeplan Associates, Inc. cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Payment of the amount to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities

and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies respondents and the file number of this proceeding.

A copy of the cover letter and check shall be sent to Marshall Gandy, counsel for the Division of Enforcement, Securities and Exchange Commission, Fort Worth Regional Office, Burnett Plaza, Suite 1900, 801 Cherry Street, Unit #18, Forth Worth, TX 76102-6882.

By the Commission.

Nancy M.
Morris
Secretary

Appendix "B"

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1037 September Term 2008

SEC8820

Filed On: June 19, 2009

David H. Disraeli,
Petitioner
v.
Securities and Exchange Commission,
Respondent

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

BEFORE: Garland, Griffith, and Kavanaugh, Circuit Judges

JUDGMENT

This petition for review of an order of the Securities and Exchange Commission was considered on the briefs and appendices filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 340). It is ORDERED AND ADJUDGED that the Securities and Exchange Commission order filed December 21,2007, be affirmed. This court will "uphold the SEC's legal conclusions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and its factual findings as long as they are "supported by substantial

evidence." Seghers v. SEC, 548 F.3d 129, 132 (D.C. Cir. 2008) (citations omitted).

The court "accord[s] great deference to the SEC's decisions as to a choice of sanction, inquiring only whether a sanction 'was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" WHX Corp. v. SEC, 362 F.3d 854, 859 (D.C. Cir. 2004) (quoting KPMG, LLP v. SEC, 289 F.3d 109, 121 (D.C. Cir. 2002)). To adequately justify a decision to bar an individual from the industry, the SEC must consider "'the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongfulness of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations' in determining a sanction that protects the public interest." Seghers, 548 F.3d at 135 (quoting Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979)).

The court has considered petitioner's arguments and concluded that he has not demonstrated error in the SEC's decision that his conduct in connection with the Lifeplan offering violated Securities Act Section 17(a), Exchange Act Section 10(b), Exchange Act Rule 10b-5, Advisers Act Sections 206(1), (2), and (4), and Advisers Act Rule 206(4)-4(a)(1); his registration with the Commission violated Advisers Act Sections 203A and 207; his failure to make, keep, and furnish necessary records violated Advisers Act Section 204 and Advisers Act Rules 204-2(a)(1), (2), and (6); and the

sanctions against him were warranted. To the extent petitioner can establish that he has repaid the funds he transferred from Lifeplan's bank account to his own, such payments will offset his disgorgement obligation. S.E.C. v. Palmisano, 135 F.3d 860, 863-64 (2d Cir. 1998).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition f,o,r rehearing en bane. Sec Fed. R. App.P.41(b); D.C.Cir. Rule41. .".

Per Curiam

Appendix "C"

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1037 September Term 2008
SEC-8820

Filed On: August 31, 2009
David H. Disraeli,
Petitioner
v .
Securities and Exchange Commission,
Respondent

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel,Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing en banc, and the absence of arequest by any member of the court for a vote, it is**ORDERED** that the petition be denied.**Per Curiam**

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk/LD